# RECENT CASE NOTES

ADMIRALTY—SALVAGE OF ONE GOVERNMENT VESSEL BY ANOTHER.—A government tug was chartered at the usual rate of $25.00 an hour to tow *The Olockson*, a United States Shipping Board vessel which was on fire, into shoal water and sink her. *The Olockson* had been abandoned by her master and crew. After permission was secured from the Marine Superintendent to attempt to save the vessel, the captain and crew of the tug through highly meritorious service succeeded in getting *The Olockson* into port where the cargo and vessel, worth nearly $300,000, was saved. The members of the tug's crew brought this suit in admiralty for salvage. *Held,* (one judge *dissenting*) that the plaintiff could recover an award of $15,000. *The Olockson* (1922, C. C. A. 5th) 281 Fed. 690.

A claim for salvage must contain the following elements: (1) a marine peril to the property rescued; (2) service voluntarily rendered when not required as an existing duty or by special contract; (3) success in whole or in part. *Manchester Liners Ltd. v. United States* (1918) 53 Ct. Cl. Rep. 449; 35 Cyc. 720. Since an award for salvage is given because of the desirability of compensating extraordinary and voluntary services rendered at sea in time of peril, it is immaterial that both vessels are under the same ownership. See, Act of August 1, 1912 (37 Stat. at L. 242); *Gilchrist Transp. Co. v. Northern Wheat* (1903, W. D. N. Y.) 120 Fed. 432. Nor does the fact that both are owned by the government prevent a recovery. *Jacobsen v. Panama Ry.* (1920, C. C. A. 2d) 266 Fed. 344; *Rees v. United States* (1904, N. D. Calif.) 134 Fed. 146. A more difficult problem would arise if both vessels were battleships. The test of whether or not the acts performed were in line of duty would probably be applied. See *The Ulysses* (1888, C. A.) 60 L. T. R. (N. S.) 111. The view in the dissenting opinion was that the service rendered was covered by the express contract. As the work was of such a dangerous character, however, that the tug would have been privileged to refuse to perform the contract such a view cannot be supported. For a further discussion of the law of salvage see (1921) 30 YALE LAW JOURNAL, 757.

ATTACHMENTS—CONVERSION OF SECURITIES—ACTUAL AND CONSTRUCTIVE FRAUD.—The defendant rehypothecated stocks which the plaintiff had pledged with him for a debt larger than that which they secured and upon tender was unable to return them. The plaintiff levied an attachment on the defendant's property under a statute permitting such a levy where the defendant "fraudulently contracted the debt or incurred the obligation respecting which the action is brought." Bagby's Ann. Md. Code, 1911, art. 9, sec. 36. *Held,* that the unlawful conversion was a "debt fraudulently contracted" within the meaning of the statute. *Turner & Thomas v. Schwarz* (1922, Md.) 117 Atl. 904.

By the great weight of authority a rehypothecation of securities by the pledgee to secure a larger debt than that for which they were pledged to him is a conversion. *Sproul v. Sloan* (1913) 241 Pa. 284, 88 Atl. 501. Statutes limiting attachments to claims arising on contract are generally construed to include quasi-contractual claims, so that the tort may be waived and the suit considered as arising from an "implied" contract. *State v. Superior Court* (1919) 105 Wash. 676, 178 Pac. 827. To sustain the attachment, there must be an actual intent to defraud on the part of the debtor. *Fidelity Co. v. Johnston* (1906) 117 La. 880, 42 So. 357. The term "fraud" covers a species of wrong involving moral turpitude and may be defined as any unfair means used with the express intention of deceiving another. Thus, in the action of deceit it is necessary to prove a representation known to be false and made with the specific intention that it be acted on. *Kountze v. Kennedy* (1895) 147 N. Y. 124, 41 N. E. 414; Pollock, *Torts* (11th ed. 1920) 281. A negligent misrepresentation is not sufficient.

*Derry v. Peek* (1889, H. L.) 14 A. C. 337. However, if made recklessly it is equivalent to the requisite *scienter*. *Miller v. John* (1904) 208 Ill. 173, 70 N. E. 27. By the weight of authority an innocent principal is liable in deceit for the misrepresentations of his agent. *Barwick v. Joint Stock Bank* (1867) L. R. 2 Exch. 259; 2 Mechem, *Agency* (2d ed. 1914) sec. 1995. This, however, is not an abandonment of the requirement of moral turpitude in the facts constituting the tort, but rather a necessary incident of the doctrine of *respondeat superior* in allocating responsibility. In equity the term "fraud" is made susceptible of wider application. A person will not be allowed to retain the fruits of a bargain induced by his innocent misrepresentation. *Helvetia Copper Co. v. Hart Parr Co.* (1917) 137 Minn. 321, 163 N. W. 665; 3 Williston, *Contracts* (1920) sec. 1500. Equity seeks to relieve from an unjust enrichment and an actual misrepresentation is the essential operative fact, so the term "equitable fraud" may perhaps be condoned. Again, although an actual intent to defraud is necessary to invalidate a will, yet if there is an unjust enrichment because of the repudiation of a parol promise on the part of the devisee or legatee, though he had no fraudulent intent at the outset, a constructive trust exists in favor of intended beneficiaries. Rood, *Wills* (1904) sec. 171; *In re Everts Estate* (1912) 163 Calif. 449, 125 Pac. 1058; Gifford, *Will or No Will?* (1920) 20 COL. L. REV. 862. A large class of cases is embraced in the loose term "constructive fraud." Where the consideration for a contract is so inadequate as to shock the conscience, or where one of the parties is mentally weak or laboring under necessity or pecuniary distress, the court is said to presume fraud in fact, and equity will set aside the transaction. Pomeroy, *Equity Jurisprudence* (4th ed. 1918) sec. 927; *Herzog v. Gipson* (1916) 170 Ky. 325, 185 S. W. 1119. But proof of good faith is a defense. *Grimminger v. Alderton* (1915) 85 N. J. Eq. 425, 96 Atl. 80. A breach of a fiduciary relation by failure to make full disclosure is said to be "constructive fraud": for example, a conveyance of trust property by a trustee to himself without knowledge or consent of the *cestui que trust* is always voidable. *Linsley v. Strang* (1910) 149 Iowa, 690, 126 N. W. 941. But, wherever applied, the term "constructive fraud" is purely a fiction and is only confusing. Smith, *Surviving Fictions* (1917) 27 YALE LAW JOURNAL, 317, 319; *cf. Nocton v. Lord Ashburton* [1914, H. L.] A. C. 932; (1915) 31 L. QUART. REV. 93. In view of the variety of meanings which courts attach to the term "fraud," just what was intended by the legislature in the instant case becomes a matter of conjecture. On grounds of policy it seems that, unless the debtor is a non-resident, the drastic remedy of attachment ought to be confined to cases of actual *mala fides*. It is in reality an added security necessary where there is a suspicion that the debtor will prevent satisfaction of the judgment by concealing his assets. Wade, *Attachments* (1887) sec. 8. In the instant case there was sufficient evidence from both the contract and the custom of the business to warrant a belief by the defendant that his act was privileged, but in the view of the court "it was not essential to the validity of the attachment that any fraud or intention to defraud at the time should have existed." This is opposed to the great weight of authority and is objectionable in its inaccurate interpretation of an important legal concept. 30 L. R. A. 465, note; Wade, *op cit.* sec. 98.

BANKRUPTCY—EXEMPT CLASSES—CLASSIFICATION GOVERNED BY OCCUPATION AT DATE OF ACT OF BANKRUPTCY.—The defendant was engaged chiefly in farming both at the time when an involuntary petition was filed and when the act of bankruptcy was committed. When the debts were incurred, however, he was a cashier of a bank as well as a farmer. *Held,* that the occupation at the time of committing the alleged act of bankruptcy was decisive, and that the defendant could not be adjudicated a bankrupt. *In re Beiseker & Martin* (1921, D. Mont.) 277 Fed. 1010.

Section 4(b) of the Bankruptcy Act provides that "any natural person except a wage-earner or a person engaged chiefly in farming or the tillage of the soil . . . . shall be subject to the provisions . . . . of this Act." Act of July 1, 1898 (30 Stat. at L. 547). The statute is silent as to the point of time which shall determine the debtor's occupational status, and as a result the courts have reached three different conclusions. The first is that the occupation of the debtor at the time of the filing of the petition governs. *In re Matson* (1903, M. D. Pa.) 123 Fed. 743; *Hoffschlaeger Co. Ltd. v. Young Nap* (1904, U. S. D. C. Hawaii) 12 Am. Bankr. Cas. 521. This follows a literal interpretation of the statute, and adopts the general federal rule as to jurisdiction. See Bankruptcy Act, sec. 1 (10), *supra; Mollan v. Torrance* (1824, U. S.) 9 Wheat. 537, 2 Rose's Notes, 80. It is impractical, however, as it allows a debtor to defeat the purpose of the Act by changing from a non-exempt to an exempt occupation prior to the date of the petition. See *In re Disney* (1915, D. Md.) 219 Fed. 294. Another test makes the time of the act of bankruptcy the material date. *In re Luchhardt* (1900, D. Kan.) 101 Fed. 807; *In re Folkstad* (1912, D. Mont.) 199 Fed. 363; *Harris v. Tapp* (1916, S. D. Ga.) 235 Fed. 1918. This construction renders a change of occupation subsequent to the act of bankruptcy ineffective, and is usually applied in those cases where the debtor was engaged in the same occupation both at the time the debts were incurred and at the time the alleged act of bankruptcy was committed. *In re Disney, supra; In re Luchhardt, supra; In re Mackey* (1901, D. Del.) 110 Fed. 355. But under certain circumstances even this rule, although applied in the majority of cases, operates unjustly, and some courts apply a third test. Thus, if a debtor changes from a non-exempt to an exempt occupation immediately prior to the act of bankruptcy, his occupation at the time when his debts are incurred controls. *In re Burgin* (1909, N. D. Ala.) 173 Fed. 726; *In re Wakefield* (1910, N. D. Calif.) 182 Fed. 247; *Tiffany v. La Plume Condensed Milk Co.* (1905, M. D. Pa.) 141 Fed. 444. The theory of this rule is that the debtor should be estopped from setting up an exemption assumed with the intent of defrauding his creditors, and it has been properly limited to those cases where fraud or wrongful intent exist. In the instant case, therefore, where there was no evidence of fraud on which to base an estoppel, the court correctly adopted the more general and practical rule that the date of the act of bankruptcy is decisive.

CONSTITUTIONAL LAW—FREEDOM OF SPEECH AND OF THE PRESS—CENSORSHIP OF "CURRENT EVENT" MOTION PICTURES.—The plaintiff, the producer of "Pathé News," a motion picture depicting current events, attacked the constitutionality of a New York statute (N. Y. Laws, 1921, ch. 715) which provides for the censorship of all films to be exhibited in the State of New York. Application was made for a declaratory judgment under the Civil Practice Act, N. Y. C. P. A. ch. 546. *Held,* that the statute was constitutional, and that it applied to current event films. *Pathé Exchange, Inc. v. Cobb* (1922) 202 App. Div. 450, 195 N. Y. Supp. 661.

The freedom to write and publish on all subjects, which is guaranteed by the state and federal constitutions, has generally been limited only by a liability for its abuse. *Respublica v. Oswald* (1788, U. S.) 1 Dall. 317; *Bee Publishing Co. v. State* (1921, Neb.) 185 N. W. 339. The courts have frequently refused to grant injunctions forbidding the publication of libellous statements. *Brandreth v. Lance* (1839, N. Y.) 8 Paige, 23; Pound, *Equitable Relief against Defamation and Injuries to Personality* (1916) 29 HARV. L. REV. 640, 648. The Supreme Court has, since the World War, shown a greater tendency to permit restriction on the freedom of speech and of the press. *Abrams v. United States* (1919) 250 U. S. 616, 40 Sup. Ct. 17; *United States v. Burleson* (1921) 255 U. S. 407,

41 Sup. Ct. 352; COMMENTS (1920) 29 YALE LAW JOURNAL, 337; see Chafee, *Freedom of Speech* (1920) ch. 3; Wigmore, *Abrams v. United States: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time* (1920) 14 ILL. L. REV. 539. Statutes providing for state censorship of motion pictures have been uniformly held constitutional. *Mutual Film Corp. v. Industrial Comm. of Ohio* (1914) 236 U. S. 230, 35 Sup. Ct. 387; *Mutual Film Co. v. Breitinger* (1915) 250 Pa. 225, 95 Atl. 433. For discussions of the censorship problem, see *Censorship* (1921) 46 Survey, 231; *Cinema and its Censor* (1921) 109 FORTNIGHTLY REVIEW, 222. The exhibition of a person's picture in a "current events" news reel has been held not to be a violation of a statute prohibiting the use of any person's name or portrait for trade purposes, upon the theory that "current event" films are so similar to newspapers that they should be considered as coming within the "free press" constitutional provisions. *Humiston v. Universal Film Manufacturing Co.* (1919) 189 App. Div. 467, 178 N. Y. Supp. 752. The rotagravure and pictorial sections of modern newspapers approach the current event film. Apparently a distinction is recognized largely because newspapers are protected from censorship by historical bulwarks.

CONTRACTS—IMPLIED OBLIGATION TO PAY PHYSICIAN REQUESTED TO SERVE THIRD PERSON.—A child injured by the defendant's truck was carried to the office of the plaintiff, a physician. There was a conflict in the evidence as to whether or not the defendant requested the plaintiff to care for the child. It was admitted that the defendant was under no duty to furnish the child with necessary medical care. The court charged that the plaintiff might recover if the defendant had promised to pay or had requested him to attend the injured child. *Held*, that the charge, being prejudicial to the defendant, was erroneous. *Fruin v. Glassnap* (1922, Conn.) 117 Atl. 547.

A promise to pay the reasonable value of services rendered by a physician is implied in fact from a request made either by the patient or a third party who owes a legal duty to the patient to furnish him necessary medical care. *McGuire v. Hughes* (1913) 207 N. Y. 516, 101 N. E. 460. No such inference is drawn, however, from a request by one not under a legal duty to the patient. *Meisenbach v. So. Cooperage Co.* (1891) 45 Mo. App. 232. Accompanying circumstances may warrant a finding that there was an implied promise to pay. *Edson v. Hammond* (1911) 142 App. Div. 693, 127 N. Y. Supp. 359. The inference of such a promise is usually for the jury. *Raoul v. Newman* (1877) 59 Ga. 408. The fact that the request was for services at the defendant's home, that the defendant gave no indication that he was only a messenger, that the doctor responded without knowing that it was an accident case and that the defendant was under no duty to the injured person has been held to warrant such an inference. *Grattop v. Rowheder* (1901) 1 Neb. (Unof.) 660, 95 N. W. 679; *Foster v. Meeks* (1896, Sup. Ct.) 18 Misc. 461, 41 N. Y. Supp. 950; *Raoul v. Newman, supra*. Similarly where the defendant did not repudiate but objected to the amount when the bill was rendered to him. *Best v. McAuslan* (1905) 27 R. I. 107, 60 Atl. 774. A desire to protect doctors has influenced these decisions, but the conflicting desire to foster a willingness in third parties to help in an emergency has made the courts wary of finding an implied promise. Mere relationship to the patient or the fact that the defendant makes the request when the patient is unconscious are not sufficient of themselves to justify an implication of a promise to pay. *Smith v. Watson* (1842) 14 Vt. 332; *Starrett v. Miley* (1898) 79 Ill. App. 658; see 46 L. R. A. (N. S.) 577, note. In the instant case the defendant was not under a legal duty to furnish medical care to the patient. He did not summon the plaintiff, and the doctor understood that it was an accident case. A promise to pay, therefore, should not be implied from a mere request.

CORPORATIONS—NULLITY OF A CONTRACT MADE BY A CORPORATION WHICH HAS FORFEITED ITS CHARTER.—The defendant corporation, during the period of forfeiture of its charter under a statute (Calif. Sts., 1917, ch. 215, secs. 3, 9, 11) contracted with the plaintiff for his services. After the revival of its charter, the defendant refused to permit the plaintiff to begin performance. The plaintiff sued for damages. *Held,* that the plaintiff could not recover, since the contract was void. *Van Landingham v. United Tuna Packers* (1922, Calif.) 208 Pac. 973.

According to the better reasoned opinions, a corporation, upon forfeiture of its charter, comes under a disability to receive rights, privileges, or beneficial powers, but not their opposites, and is liable to suit and judgment. *Comstock v. J. R. Droney Lumber Co.* (1911) 69 W. Va. 100, 71 S. E. 255. In the instant case the corporation was under a disability to contract and, because of the penalty imposed by the statute, a duty not to contract. "Defunct" corporations still owe duties to use care and not to convert the property of others. *Miller's Adm'x. v. Newburg Coal Co.* (1888) 31 W. Va. 836, 8 S. E. 600; *Dutton Hotel Co. v. Fitzpatrick* (1920) 69 Colo. 229, 193 Pac. 549. Clearly the object of a suit for the breach of those duties is to reach the corporate funds. But, properly considered, a corporation's legal relations in regard to its funds are merely those of the persons of whom it consists. Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts* (1909) 9 COL. L. REV. 285, 290. Hence there seems to be no valid reason why they should escape liability merely because the contract was in form that of a defunct corporation. Plainly, however, the stockholders cannot be held as a *de facto* corporation merely because they continue to do business after forfeiture, although conceivably, appropriate action taken under a reviving statute might have that effect. *Bird v. Gay* (1910) 162 Mich. 612, 127 N. W. 814. On the entity theory, the corporation is dead and cannot be sued; neither can a non-existent corporation be estopped to deny its existence. But where the directors of an ostensible corporation are sued personally they are estopped to deny their directorship. *Council v. Brown* (1921) 151 Ga. 564, 107 S. E. 867; see (1919) 28 YALE LAW JOURNAL, 604. If the stockholders actually authorize the officers or directors to continue to do business as though a corporation still exists a similar estoppel might well be raised against them. The more difficult question of apparent authority arises where business is carried on after forfeiture without the stockholders' express sanction. Some cases indicate that the stockholders or directors could then he held as partners. *Cf. Sanders & Walker v. Herndon* (1908) 128 Ky. 437, 108 S. W. 908; *Central Nat. Bank v. Sheldon* (1915) 96 Kan. 492, 152 Pac. 765. In any event the contracting agent could be held for breach of warranty of authority. See COMMENTS (1917) 27 YALE LAW JOURNAL, 248. The instant decision, however, rests squarely upon the language of the statute. *Newhall v. Western Zinc Mining Co.* (1912) 164 Calif. 380, 128 Pac. 1040. The injustice caused could be prevented by the enactment of a law providing that corporations, defunct by forfeiture of charter, may acquire duties but not rights; liabilities but not powers.

CORPORATIONS—LIBEL AND SLANDER—RIGHT OF THE CORPORATION TO MAINTAIN AN ACTION FOR LIBEL.—The defendant published a poster defaming the editor of the plaintiff newspaper, a corporation. The editor was charged with hypocrisy, drunkenness, and moral turpitude. The corporation brought an action for libel. *Held,* (two judges *dissenting*) that the corporation could not recover. *Adirondack Record v. Lawrence* (1922, N. Y.) 202 App. Div. 251.

A corporation may sue for a libel which reflects on the management of its business or property and which necessarily affects its credit and directly occasions pecuniary injury. Such a libel is actionable *per se. Puget Sound Nav. Co. v. Carter* (1916, D. Wash.) 233 Fed. 832; *Reporters' Ass'n. v. Sun* (1906) 186 N. Y. 437, 79 N. E. 710; *Coal Land Development Co. v. Chidester* (1920) 86 W. Va.

561, 103 S. E. 923; *Hapgoods v. Crawford* (1908) 125 App. Div. 856, 110 N. Y. Supp. 122. It necessarily follows that the libel to be actionable *per se* must be upon the corporation as distinguished from its individual members. *Brayton v. Police Co.* (1900) 63 Ohio, 83, 57 N. E. 1085; *Pa. Iron Works v. Voght Mach. Co.* (1906) 29 Ky. L. Rep. 861, 96 S. W. 551. Some libels, personal in their nature, depending on matters which require such a personality as a corporation can not possess, are not actionable by a corporation. Examples of these are charges of murder, incest, adultery, or corruption. *Manchester v. Williams* [1891] 1 Q. B. 94 (corruption); see *South Hetton Coal Co. v. N. E. News Assoc.* [1894] 1 Q. B. 133; *Metropolitan Omnibus Co. v. Hawkins* (1859, Exch.) 5 Jur. (N. S.) 226 (dicta as to murder, incest, and adultery). For a criticism of this view, see Bower, *A Code of the Law of Actionable Defamation* (1908) 279. Since a corporation has neither character to be affected nor feeling to be injured it must allege and prove special damage when its business reputation or property rights are not injuriously affected. *Kemple & Mill v. Kaighn* (1909) 131 App. Div. 63, 115 N. Y. Supp. 809; *Shoe & Leather Bank v. Thompson* (1865, N. Y.) 18 Abb. Pr. 413; *Memphis T. Co. v. Cumberland T. T. Co.* (1906, C. C. A. 6th) 145 Fed. 904; *cf. Riding v. Smith* (1876) 1 Exch. Div. 91. The fact that the editor, and not the corporation, was defamed, as the poster bore no imputation that the corporation entrusted the management of the paper to an unfit editor, justifies the view of the instant case. The acts charged were of such a nature that they could not have been committed by any other than a natural person; a corporation can no more be drunk than guilty of adultery or incest. Obviously the case is in harmony with the authorities.

HUSBAND AND WIFE—ACTION BY WIFE AGAINST HUSBAND FOR SERVICES.—For three years the plaintiff rendered service in her husband's place of business by waiting on customers and repairing instruments. She brought an action to recover upon a *quantum meruit* for her services. The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. *Held,* that the demurrer should be sustained. *Dorsett v. Dorsett* (1922, N. C.) 111 S. E. 541.

At common law a wife could not sue her husband; her service and labor during coverture were the property of her husband. 1 Blackstone, *Commentaries* *443; *Prescott v. Brown* (1843) 23 Me. 305; *Hinman v. Parkis* (1866) 33 Conn. 188. But the varying interpretations of Enabling Statutes, permitting actions by the wife against her husband, have thrown the law into some confusion. It is now generally provided that a wife is entitled to wages for services performed for third parties. N. Y. Cons. Laws, 1909, ch. 14, sec. 60; *Martin v. Robson* (1872) 65 Ill. 129. A wife is under no duty because of the marriage relation to perform services in her husband's business. *Carse v. Reticker* (1895) 95 Iowa, 25. Otherwise with reference to household services; hence even an express contract for compensation is not enforceable because of lack of consideration. *Bohanan v. Maxwell* (1921) 190 Iowa, 1308, 181 N. W. 683. There is good consideration for the husband's promise to pay for services in a business not connected with the home. *Nuding v. Urich* (1895) 169 Pa. 289, 32 Atl. 409; *Roche v. Union Trust Co.* (1899, Ind. App.) 52 N. E. 612. But some Enabling Statutes have been interpreted as not changing the common law rule that any services that the wife renders for the husband belong to him. N. Y. Laws, 1860, ch. 90, sec. 2; *Blaechinska v. Howard Mission* (1892) 130 N. Y. 497, 29 N. E. 755. This result has even been obtained where services were rendered to the husband's firm. *Turner v. Davenport* (1900) 61 N. J. Eq. 18, 47 Atl. 766. The majority view is with the instant decision in cases where there is no express promise. *Overbeck v. Ahlmeier* (1902) 106 Ill. App. 606; *contra, In re Cox* (1912, D. N. M.) 199 Fed. 952; *cf. Smith v. Axe* (1894) 14 Pa. Co. Ct. R. 532.

Since the wife is under no duty to assist her husband in his business and could recover for a similar service to a third party she should be able to recover from her husband, even in the absence of an express contract. The normal intra-family assumption that the services were volunteered as a gift should be rejected, however, only when the wife has regular duties and responsibilities as an employee and not when she lends her aid in emergencies, no matter how frequent. For the tort liability of the husband to the wife, see (1918) 27 YALE LAW JOURNAL, 564, 1081; (1922) 32 *ibid.* 196.

JURISDICTION—SUIT UPON CONTRACT TO PURCHASE LAND COGNIZABLE AT SITUS.—The plaintiff brought suit in X County to cancel his contract with the defendant for the purchase of land situated in Y County, on the ground of fraudulent misrepresentations by the defendant. A statute (N. C. Cons. Sts. 1919, sec. 463) provided that a suit involving the determination of a right or interest in real property must be brought in the county in which the land is situated. *Held,* that the action should have been brought in Y County. *Vaughn v. Fallin* (1922, N. C.) 111 S. E. 513.

The common law, distinguishing between transitory and local causes of action, requires the latter to be brought where the cause of action arises. The basis of the rule is historical. Storke, *The Venue of Actions of Trespass to Land* (1921) 27 W. VA. L. QUART. 301. Although it has been universally criticized as being technical, illogical, and unjust, it has been followed in almost every jurisdiction, and courts adhere to it under the doctrine of *stare decisis.* See Marshall, J., in *Livingston v. Jefferson* (1811, C. C. D. Va.) 15 Fed. Cas. No. 8411; (1922) 20 MICH. L. REV. 913. In this country it is applied not only to actions brought in one state concerning real property in another state but also to actions brought in one county concerning real estate in another county. Only one court has repudiated the distinction as between states (not between counties) and permitted a recovery if the cause of action is *in personam,* regardless of whether title to land is involved or not. *Little v. Chicago Ry.* (1896) 65 Minn. 48, 67 N. W. 846. The identical result has been reached in New York by statute. N. Y. C. C. P. sec. 982 (a), now Real Property Law, sec. 536; see *Jacobus v. Colgate* (1916) 217 N. Y. 235, 111 N. E. 837. Louisiana, not being bound by the common law, does not recognize the distinction. *Holmes v. Barclay* (1849) 4 La. Ann. 63. It has also been abolished in a few states as between counties. Albertsworth, *Leading Developments in Procedural Reform* (1922) 7 CORN. L. QUART. 310. The distinction should be between proceedings *in rem* and proceedings *in personam.* See Lord Mansfield in *Mostyn v. Fabrigas* (1774, K. B.) Cowp. 161, 176; Scott, *Fundamentals of Procedure in Actions at Law* (1922) 31. In accordance with this view it has been held that a suit to set aside a deed and to obtain specific performance of a contract to sell land is transitory when the decree operates *in personam* and not directly upon the land. *Hayes v. O'Brien* (1894) 149 Ill. 403, 37 N. E. 73; *cf. Massie v. Watts* (1810, U. S.) 6 Cranch, 148, 160; see Barbour, *Extra-Territorial Effect of the Equitable Decree* (1919) 17 MICH. L. REV. 527. In the instant case no real estate record was involved, the relief sought being merely the cancellation of the fraudulently procured contract for the purchase of land. The opposite result was reached in a case involving similar facts and a similar statute, on the ground that the decree would not affect title to land. *State, ex rel. Barrett, v. District Court* (1905) 94 Minn. 370, 102 N. W. 869; *cf. State, ex rel. Weld, v. District Court* (1920) 146 Minn. 422, 178 N. W. 1004; *English v. Gibbons* (1914) 79 Wash. 210, 140 Pac. 322. In view of the harshness of the rule it seems that relief should be refused only when the decree will directly affect title to realty outside the jurisdiction of the court.

MUNICIPAL CORPORATIONS—REGULATION OF JITNEYS.—By its charter the city of Miami had the power "to license, control, tax, and regulate traffic and sales upon the street." Par. H. H., sec. 3. An ordinance forbade the operation of jitneys on certain streets. The plaintiff was arrested for a violation of this ordinance and sued out a write of *habeas corpus*. *Held*, (two judges *dissenting*) that the ordinance was invalid since the charter did not confer the authority wholly to prohibit the operation of jitneys on the streets. *Quigg v. State* (1922, Fla.) 93 So. 139.

Although the authority over all public streets and highways is vested in the state legislature, it may be delegated to municipalities. Ordinances may then be passed reasonably regulating the use of the streets. *Parrish v. Richmond* (1916) 119 Va. 180, 89 S. E. 102; Dillon, *Municipal Corporations* (5th ed. 1911) sec. 1166. Thus ordinances taxing jitneys, requiring them to specify routes and schedules, and prohibiting operation when overloaded, have been held valid. *Huston v. Des Moines* (1916) 176 Iowa, 455, 156 N. W. 883; *Dallas v. Gill* (1918, Tex. Civ. App.) 199 S. W. 1144; see (1915) 64 U. PA. L. REV. 101. No city has exercised this power of regulation to the extent of entirely excluding jitneys from operation, but some courts have intimated that such a power exists. See *West v. Asbury Park* (1916) 89 N. J. L. 402, 99 Atl. 190; *Ex parte Dickey* (1915) 76 W. Va. 576, 85 S. E. 781. Partial prohibition is reasonable regulation. Freund, *Police Power* (1904) sec. 58. Thus, a municipality may refuse to grant permits for the operation of jitneys on certain congested streets. *San Antonio v. Feltzer* (1922, Tex. Civ. App.) 241 S. W. 1034; *Schoenfeld v. Seattle* (1920, Wash.) 265 Fed. 726; *Allen v. Bellingham* (1917) 95 Wash. 12, 163 Pac. 18; *contra, Curry v. Osborne* (1918) 76 Fla. 39, 79 So. 293. Or this may be done by a confiscatory tax. *Dresser v. Wichita* (1915) 96 Kan. 820, 153 Pac. 1194. Public Service Commissions, through their power of regulation, may prohibit the operation of jitneys. *State v. Darazzo* (1922, Conn.) 118 Atl. 81; see COMMENTS (1921) 31 YALE LAW JOURNAL, 183. Although the ordinance in the instant case prohibited jitney operation on certain streets only, the court seems to have assumed that the prohibition was total and hence invalid. Granting that it was, is not the power of regulation broad enough to include absolute prohibition?

PLEADING—IMPROPER TO SPLIT CAUSE OF ACTION FOR INJURIES TO PERSON AND PROPERTY.—The plaintiff's person and property were injured by the defendant's car. Having recovered a judgment for damages to his property, the plaintiff sued for injuries to his person. *Held*, that the judgment in the former suit was a bar. *Fields v. Rapid Transit Co.* (1922, Pa.) 117 Atl. 59.

A single cause of action arising either in contract or tort cannot be divided so as to furnish bases for several suits. *Secor v. Sturgis* (1858) 16 N. Y. 548; *Lamb v. St. Louis Ry.* (1888) 33 Mo. App. 489; *McKnight v. Minneapolis Ry.* (1914) 127 Minn. 207, 149 N. W. 131. The determination of what acts give rise to a cause of action presents much difficulty. The majority view is that although the defendant's wrongful act may result in a violation of more than one primary right, the single act gives rise to but one cause of action. *King v. Chicago & St. Paul Ry.* (1900) 80 Minn. 83, 82 N. W. 1113; *Kimball v. Louisville & N. Ry.* (1909) 94 Miss. 396, 48 So. 230; *Ochs v. Public Service Ry.* (1910) 80 N. J. L. 148, 77 Atl. 533. The theory seems to be based upon convenience rather than policy. The view of the minority, which is also the English rule, is that no cause of action can arise unless there is a violation of a primary right, and that each violation constitutes a distinct chose in action. *Brunsden v. Humphrey* (1884) 14 Q. B. Div. 141; *Watson v. Tex. & Pac. Ry.* (1894) 8 Tex. Civ. App. 144, 27 S. W. 924; *Reilly v. Asphalt Co.* (1902) 170 N. Y. 40, 62 N. E. 772. The courts adopting the latter view usually cite three grounds for the impracticability of joining the causes of action for injuries to

person and to property: (1) Different periods of limitation apply. (2) An action for injury to person abates with the plaintiff's death, whereas an action for injury to property does not. (3) Actions for injury to person are assignable; those for injury to property are not. *Reilly v. Asphalt Co., supra.* These apparent procedural difficulties should not be troublesome in practice. The first two are easily obviated, either by holding the statute a bar merely to so much of the damage as would be outlawed, or, in case of death, by permitting a revival of the action so far as it relates to property. To compel a plaintiff who has not assigned any part of a cause of action which is partly assignable and partly not to sue for his entire demand in a single action is no greater hardship than to compel him to bring suit at law upon his entire demand if the whole cause of action is assignable. It is not obvious that any difference in policy results from the fact that the cause of action is derived from more than a single primary right. If the injured party before suit assigns his right to damages for injury to property the argument against permitting him to vex the defendant by two suits does not of course apply. *Underwriters at Lloyds Ins. Co. v. Traction Co.* (1913) 106 Miss. 244, 63 So. 455. Furthermore the same witnesses must necessarily testify as to all injuries caused by the wrongful act. The most desirable rule is that reached in the instant case, to settle without prejudice to either party all issues in a minimum number of suits.

SALES—CONDITIONAL SALES—PRIVILEGE OF VENDOR TO REPLEVY PROPERTY AFTER SUING FOR THE PURCHASE PRICE.—The plaintiff sold a soda fountain to the defendant under a conditional sale contract. On default of any payment all of the purchase money notes were to become due. The vendee defaulted and the vendor "prosecuted to verdict" an action on all of the notes remaining unpaid. In a second action the vendor sought to replevy the soda fountain. *Held,* that the plaintiff could recover. *American Soda Fountain Co. v. Najarian* (1922, Sup. Ct.) 195 N. Y. Supp. 555.

Previous to the Uniform Conditional Sales Act there were two lines of authority as to the remedies open to a vendor for the breach of a conditional sale contract. The more prevalent view was that the vendor might elect either to retake the property or to sue for the purchase price; a resort to one of the remedies barred the other. *Crompton v. Beach* (1892) 62 Conn. 25, 25 Atl. 446; *Whitney v. Abbott* (1906) 191 Mass. 59, 77 N. E. 524; *Francis v. Bohart* (1915) 76 Or. 1, 147 Pac. 755; see (1915) 13 MICH. L. REV. 603; COMMENTS (1920) 30 YALE LAW JOURNAL, 742. Notwithstanding the specific agreement reserving title in the vendor, a suit for the full purchase price was held necessarily to imply the seller's consent to vest title in the buyer, and hence to be inconsistent with a later attempt to replevy. But a suit for installments, other than the last, did not fall within the rule. *Schmidt v. Ackert* (1918) 231 Mass. 330, 121 N. E. 24; *Silverstin v. Kohler* (1919) 181 Calif. 51, 183 Pac. 451. This theory is objectionable. See *Defiance Machine Works v. Gill* (1920) 170 Wis. 477, 175 N. W. 940. A conditional sale agreement expressly provides that title shall not pass until the price is paid. Under such a contract there is no logical necessity for title to pass as a condition precedent to suit, and obtaining a judgment does not alter this situation until the judgment is satisfied. Burdick, *Sales* (2d ed. 1901) 191. Furthermore, the title is retained essentially as security, as in the case of a sale and a mortgage back. *Steinert & Sons v. Reed* (1919) 118 Me. 403, 108 Atl. 334; Williston, *Sales* (1909) sec. 579. To require the release of the security before suing for the debt is not in accord with good commercial practice. Under the second line of authority the vendor might retake the property at any time before the satisfaction of judgment, the remedies being treated as consistent and cumulative. *Wiedenbeck-Dobelin Co. v. Anderson* (1918) 168 Wis. 212, 169 N. W. 615; *Kirch v. La Tourette* (1918) 91 N. J. L. 35, 102 Atl. 873; *Johnson v. Martin Furniture Co.* (1918) 139 Tenn. 580, 202 S. W. 916. This rule was

applied in the instant case. Even under it, the vendor relinquishes his right to the price if he retakes the chattel. *Ratchford v. Cayuga County Co.* (1916) 217 N. Y. 565, 112 N. E. 447. The recent adoption of the Uniform Conditional Sales Act in New York makes a desirable advance, giving the vendor power to resell the chattel when retaken and to apply the proceeds on the debt. Uniform Conditional Sales Act, sec. 21; *Wurlitzer v. Mandarin Co.* (1922, Wis.) 188 N. W. 639. The Act also makes similar progress in the protection of the conditional vendee. Secs. 18-20.

SPECIFIC PERFORMANCE—SUIT QUASI IN REM—JURISDICTION ACQUIRED AGAINST NON-RESIDENT DEFENDANT THROUGH CONSTRUCTIVE SERVICE.—The complainant, the assignee of the vendee, sought specific performance of a contract for the sale of land situated in New Jersey. The defendant, a non-resident, appeared specially attacking the jurisdiction of the court. The statutes regulating service by publication on non-residents impliedly included suits for specific performance. N. J. Comp. Sts. 1910, Chancery, secs. 12-18. By another statute an equitable decree for the conveyance of lands, not complied with by the party ordered to convey, was given the same force and effect as if the conveyance had been executed pursuant to the decree. N. J. Comp. Sts. 1910, Chancery, sec. 45. *Held*, that by reason of the statutory provisions, the suit was *quasi in rem* and, that if there was proper service by publication, jurisdiction was acquired for a decree valid against the non-resident defendant. *McVoy v. Baumann* (1922, N. J. Eq.) 117 Atl. 717.

In the absence of statutory modification a suit for specific performance of a contract to convey realty is a proceeding *in personam* and not *in rem*, and the defendant must therefore be served personally in order to subject him to the jurisdiction of the court. *Hollingsworth v. Barbour* (1830, U. S.) 4 Pet. 466. Since a state has control over all property within its limits it is within its power, through statute, to give to such a suit the character of a suit *in rem* or *quasi in rem*, so as to sustain jurisdiction on constructive service against a non-resident. *Arndt v. Griggs* (1890) 134 U. S. 316, 10 Sup. Ct. 557. Under a statute authorizing the appointment of a trustee to convey land an action for specific performance of a contract against a non-resident defendant is a proceeding *in rem* and notice by publication is sufficient. *Hollander v. Central Metal & Supply Co.* (1908) 109 Md. 131, 71 Atl. 442; see *contra, Kinkead v. Clark* (1922, Tex. Civ. App.) 239 S. W. 717; 23 L. R. A. (N. S.) 1135, note. If the statute merely provides for service by publication without specifying the class of actions in which it is permissible, it seems that a suit for specific performance is not a suit *in rem* or *quasi in rem* so as to authorize constructive service. *Silver Camp Mining Co. v. Dickert* (1904) 31 Mont. 488, 78 Pac. 967. Where, however, the statute expressly includes suits for specific performance constructive service may be had. *Simmons v. Fry* (1890) 19 D. C. 472; cf. *Light v. Doolittle* (1921, Ind. App.) 133 N. E. 413. Frequently, as in the instant case, there is a statute giving to decrees for conveyances effect *in rem* and at the same time a statute governing service by publication which either expressly or impliedly authorizes such service in suits for specific performance. In such cases the courts usually sustain jurisdiction on constructive service. *Clem v. Givens* (1906) 106 Va. 145, 55 S. E. 567; *Hawkins v. Doe* (1912) 60 Or. 437, 119 Pac. 754; *Light v. Doolittle, supra.*

TORTS—CONTRIBUTORY NEGLIGENCE OF PASSENGER IN AUTOMOBILE.—The defendant, knowing the reckless character of his sixteen-year-old son, permitted him to use his automobile to take a young lady to a dance. The son, driving between 50 and 60 miles an hour on a crowded thoroughfare, collided with another machine and his companion was killed. The administrator of the deceased sued the father. Under a plea of contributory negligence the defendant attempted to

introduce evidence that the girl requested the driver "to get her home in a hurry." This evidence was excluded. *Held,* that the testimony was properly excluded, because it did not show that the guest had any control over the driver, or that the request was the proximate cause of the accident. *Tyree v. Tudor* (1922, N. C.) 111 S. E. 714.

By the great weight of authority, the negligence of the driver of an automobile is not imputable to a guest or passenger who is riding in the machine and who has no authority or control over the machine or the driver. *White v. Carolina Realty Co.* (1921) 182 N. C. 536, 109 S. E. 564; L. R. A. 1915 B, 953, note. But a passenger or guest is bound to exercise reasonable care for his own safety, and a failure to do so constitutes contributory negligence. *Winston's Adm'r. v. City of Henderson* (1918) 179 Ky. 220, 200 C. W. 330. The care required of the guest varies greatly with the circumstances. See (1921) 31 YALE LAW JOURNAL, 101. The result in the principal case is based upon the rule that a guest, to be barred from recovery, must either have control or authority over the driver. But the duty of the passenger to use due care for his own safety does not depend upon principles of agency. *McGeever v. O'Byrne* (1919) 203 Ala. 266, 82 So. 508. One riding in a motor vehicle may be properly charged with negligence if he encourages or permits the driver to proceed at an unreasonable speed without remonstrance. *Hardie v. Barrett* (1917) 257 Pa. 42, 101 Atl. 75; *Langley v. So. Ry.* (1919) 113 S. C. 45, 101 S. E. 286; *Jepson v. Crosstown St. Ry.* (1911, Sup. Ct.) 72 Misc. 103, 129 N. Y. Supp. 233; *Howe v. Corey* (1920) 172 Wis. 537, 179 N. W. 791; *McGeever v. O'Byrne, supra;* Huddy, *Automobiles* (6th ed. 1922) 912. Many recent cases even hold it to be contributory negligence on the part of the guest who fails to warn the driver of approaching danger. *Ohio Electric Co. v. Evans* (1922, Ind. App.) 134 N. E. 519; *Seiffert v. Hines* (1922, Neb.) 187 N. W. 108; *Kirschbaum v. Phila. R. T. Co.* (1919) 73 Pa. Super. Ct. 536; *Hill v. Phila. R. T. Co.* (1921) 271 Pa. 232, 114 Atl. 634. Inasmuch as failure to object to an unreasonable rate of speed or other reckless driving constitutes contributory negligence on the part of the guest so as to preclude a recovery, it seems that the court should have admitted evidence which would have tended to prove, not only that the deceased acquiesced in the excessive speeding, but apparently encouraged it.

TORTS—DISTINCTION BETWEEN ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE.—While the driver of the defendant's truck was attempting to execute a turn, the plaintiff, believing his automobile, which was parked on the opposite side of the street, to be in danger, seized the bumper of the truck in an endeavor to assist the driver. He was crushed between the bumper and his automobile, and brought an action in tort for negligence. The defendant pleaded contributory negligence. *Held,* that the plaintiff was not guilty of contributory negligence as a matter of law, but that it was a question for the jury whether, under the circumstances, his actions were reasonable. *Wardrop v. Santi Moving & Express Co.* (1922, N. Y.) 135 N. E. 272.

The distinction between the defenses of assumption of risk and contributory negligence is tenuous, and courts frequently confuse them by discussing cases involving assumption of risk in the light of contributory negligence. *Harding v. Philadelphia Transit Co.* (1907) 217 Pa. 69, 66 Atl. 151; *Dixon v. N. Y., N. H. & H. Ry.* (1910) 207 Mass. 126, 92 N. E. 1030. Assumption of risk and contributory negligence are separate and distinct defenses. *Knox v. American Rolling Mill* (1908) 236 Ill. 437, 86 N. E. 90; *George v. St. Louis & San Francisco Ry.* (1910) 225 Mo. 364, 125 S. W. 196. In the former case the plaintiff voluntarily, consciously, and deliberately elects to assume the risk; contributory negligence excludes the idea of deliberation and choice. Assumption of risk negatives the idea of prima facie liability, whereas contributory negligence is

an affirmative defense operating to rebut such a liability. *Rase v. Minneapolis, St. Paul, etc. Ry.* (1909) 107 Minn. 260, 120 N. W. 360; Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233, 245. The better view, supported by the weight of authority, is that one may incur a reasonable danger in attempting to save life or property without barring a right to recover. *McKay v. Atlantic Coast Line Ry.* (1912) 160 N. C. 260, 75 S. E. 1081; *Wilson v. Northern Pac. Ry.* (1915) 30 N. D. 456, 153 N. W. 429. There is a respectable minority to the contrary, however, if property alone is at stake. *Cook v. Johnson* (1885) 58 Mich. 437, 25 N. W. 388; *Hill v. East St. Louis Cotton Oil Co.* (1919) 202 Mo. App. 478, 214 S. W. 419. Usually no error results from confusing assumption of risk and contributory negligence, but sometimes, where a statute bars the former defense, the distinction becomes of vital importance. *Schlemmer v. Buffalo, Rochester & Pittsburg Ry.* (1911) 220 U. S. 590, 31 Sup. Ct. 561. The result reached by the instant case is undoubtedly correct, but the court discusses what appears to be a situation involving assumption of risk as though it were contributory negligence, thus adding to the existing confusion.

TORTS—MALICIOUS INJURY OF ANOTHER IN HIS TRADE.—The plaintiff had for years exploited in the columns of his newspaper the personal affairs of the defendant, and had ridiculed the patent remedy manufactured by him. With the avowed purpose of injuring the plaintiff, the defendant established a rival newspaper which eventually drove the plaintiff out of business. However, the defendant's paper continued to be published. *Held,* (one judge *dissenting*) that the plaintiff had no cause of action. *Beardsley v. Kilmer* (1922, N. Y.) 200 App. Div. 378.

It has frequently been said that the motive which actuates a person in doing an act which he is privileged to do is immaterial, since the law deals only with externals. *Allen v. Flood* [1898, H. L.] A. C. 1; *Passaic Print Works v. Ely Co.* (1900, C. C. A. 8th) 105 Fed. 163; *West Va. Transp. Co. v. Standard Oil Co.* (1902) 50 W. Va. 611, 40 S. E. 591. There has been a decided trend, however, toward the view that motive may be of operative effect. *Keeble v. Heckeringill* (1707, K. B.) 11 East, 574; *Stillwater Co. v. Farmer* (1903) 89 Minn. 58, 93 N. W. 907; *Plant v. Woods* (1900) 176 Mass. 492, 57 N. E. 1011; *Bush v. Mockett* (1914) 95 Neb. 552, 145 N. W. 1011; Ames, *Tort Because of Wrongful Motive* (1905) 18 HARV. L. REV. 411. The underlying theory of such cases is not that a bad motive added to a lawful act makes the act unlawful, but that "prima facie the intentional infliction of temporal damage is a cause of action which . . . . requires a justification if the defendant is to escape." *Aikens v. Wisconsin* (1904) 195 U. S. 194, 25 Sup. Ct. 3. The law protects the "right to an open market" and an unjustifiable interference with that right is an actionable wrong. *Huskie v. Griffin* (1909) 75 N. H. 345, 74 Atl. 595. Competition in a similar kind of business is ordinarily a sufficient justification for an injury to a man in his trade provided it does not involve the use of force or fraud or the procuring of a breach of contract. *Mogul Co. v. McGregor* [1892, H. L.] A. C. 25; *Walker v. Cronin* (1871) 107 Mass. 555. Dishonest competition, however, which does not have for its object the advancement of business interests, but which is engaged in solely for the purpose of crushing a personal enemy, is not a sufficient justification for the prima facie tort. *Tuttle v. Buck* (1909) 107 Minn. 145, 119 N. W. 946; *Dunshee v. Standard Oil Co.* (1911) 152 Iowa, 618, 132 N. W. 371; Ames, *loc. cit.* The instant case can be readily distinguished from this class of cases on its facts, for although the defendant's purpose was to ruin the plaintiff's business, he did so from motives of self-interest: the advertisement of his patent remedy and the vindication of his reputation. Furthermore his newspaper continued to be published after its rival had failed.